Supreme Court, U.S.
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No. 96-109

In The

Supreme Court of the United States

October Term, 1995

DOUGLAS RAY HICKMAN, in propria persona,

Petitioner,

vs.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, and DOMINICK J. RIVETTI,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS COUNTY OF LOS ANGELES AND SHERMAN BLOCK

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QUESTION PRESENTED

The petition requests this Court to consider the following question:

Whether the Second Amendment to the Constitution confers upon individual citizens standing to enforce a personal right to keep and bear arms.

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JURISDICTION

Respondents County of Los Angeles and Sherman Block do not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Respondents County of Los Angeles and Sherman Block agree with petitioner that California Penal Code Section 12050 is relevant to these proceedings. The petition quotes the current version of the statute that was not in effect at any time relevant to petitioner's lawsuit. At the time of petitioner's applications, California Penal Code Section 12050(a) provided as follows:

> § 12050. Issuance of license; qualifications of licensee; restrictions or conditions
>
> (a) The sheriff of a county or the chief or other head of a municipal police department of any city or city and county, upon proof that the person applying is of good moral character, that good cause exists for the issuance, and that the person applying is a resident of the county, may issue to such person a license to carry concealed a pistol, revolver, or other firearm for any period of time not to exceed one year from the date of the license, or in the case of a peace officer appointed pursuant to Section 830.6, three years from the date of the license.

Cal. Penal Code § 12050(a) (West 1992).

STATEMENT OF THE CASE

Respondents County of Los Angeles and Sherman Block respectfully submit that the published opinion of the Ninth Circuit contains an accurate description of the proceedings below. Pet. App. 1a-12a.[1] For the record, respondents note the following corrections to petitioner's statement of the case:

1. Petitioner filed applications for concealed weapons licenses in 1988, 1989 and 1991 that were denied by respondents. In 1993, petitioner did obtain a concealed weapons license. Memo. Dec. at 2.

2. The petition's quotation of California Penal Code Section 12050 is inaccurate because it reflects amendments made to the statute in 1992 and 1993.

3. The procedural history regarding petitioner's efforts to seek rehearing is misstated in the petition..On April 19, 1996, the Ninth Circuit granted petitioner an extension of time until April 26, 1996, to file his petition for rehearing. On or about April 26, 1996, petitioner filed a petition for rehearing and request for hearing en banc which exceeded the Ninth Circuit's page limits. On May 6, 1996, the Ninth Circuit denied petitioner's motion to exceed the page limits and granted him leave to file a brief within the page limits by May 13, 1996. Petitioner failed to file his revised petition for rehearing within the

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[1] The Petition for Certiorari is cited as "Pet. ___." The Appendices to the Petition are cited as "Pet. App. ___." The Appendix to this Brief in Opposition is cited as "App. ___." The Ninth Circuit's unpublished Memorandum of Decision is cited as "Memo. Dec. ___."

deadline and on May 28, 1996, the Ninth Circuit denied petitioner's motion for leave to file his petition for rehearing.

REASONS FOR DENYING THE WRIT

THE ISSUE PRESENTED TO THIS COURT IS IRRELEVANT TO THE OUTCOME OF PETITIONER'S CASE.

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). As explained below, the petition raises an issue that was never raised below and would have no impact on the outcome of the underlying action.

A. As Detailed In His Own Appellate Briefs, Petitioner Never Contended Below That The Second Amendment Confers Individual Rights.

Until the publication of the Ninth Circuit's opinion, petitioner never raised the contention which he now identifies as the sole question to be presented to this Court. Indeed, in his reply brief in the Ninth Circuit, petitioner specifically stated that the *"question of whether the Second Amendment is an individual right or a collective right of the States . . . is entirely irrelevant to this appeal."* App. at 2 (emphasis added).

As petitioner explained to the Ninth Circuit, his challenge to the California licensing statute:

> exists entirely within the context of the California law regarding issuance of [concealed

> weapons] permits. It does not call into question the constitutionality of that law, nor does [petitioner's] Complaint assert a Second Amendment right to carry a concealed weapon without being licensed to do so by the State of California. Therefore it does not raise the issue of Individual rights over State rights.

App. at 3.

Simply put, petitioner asks this Court to grant certiorari on an issue which he never sought to litigate below.

B. The Petition For Certiorari Seeks Nothing More Than An Advisory Opinion.

Petitioner's arguments regarding the Second Amendment in the Ninth Circuit were directed to the issue of whether the Second Amendment limits only federal action or may be incorporated to actions of the states through the Fourteenth Amendment. App. at 7-8. In its opinion, the Ninth Circuit addressed and rejected petitioner's argument on the incorporation issue:

> Moreover, even if we determined that Hickman had standing to sue for violation of the Second Amendment, his suit would nevertheless fail because the Second Amendment is not incorporated against the states.

Pet. App. at 12a, n.10 (citation omitted).

Though he devoted all of his efforts in the Ninth Circuit to the incorporation issue, petitioner now disclaims any interest in that issue. Petitioner specifically apprises the Court that he is not asking:

> [T]his Court to make any determination with respect to a right of individuals to carry concealed firearms, nor to decide whether the Second Amendment protections apply to the states through the Doctrine of Selective Incorporation.

Pet. at 5.

As the Ninth Circuit has clearly held, petitioner cannot prevail in his lawsuit unless he prevails on the incorporation issue. By limiting his petition to the issue of standing, petitioner is asking this Court to grant certiorari on an issue that, even if he prevails, will not alter the outcome of his lawsuit. "No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885)). Petitioner's interest in the issue he has presented for review is purely academic and does warrant certiorari review by this Court.

CONCLUSION

For the reasons detailed above, respondents County of Los Angeles and Sherman Block respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

Docket Number 94-55836

DOUGLAS RAY HICKMAN, PLAINTIFF/APPELLANT

vs.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REVA B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E PEIRSOL, THE CITY OF SAN FERNANDO, and DOMINICK J. RIVETTI, DEFENDANTS/APPELLEES,

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APPEAL FROM DC# CV-91-5594 RMT
CENTRAL CALIFORNIA
Honorable Robert M. Takasugi, Judge

APPELLANT'S REPLY BRIEF

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II. STATES RIGHTS VERSES INDIVIDUAL RIGHTS IS NOT AN ISSUE IN THIS APPEAL, BUT THE SECOND AMENDMENT SHOULD GOVERN REVIEW OF A STATE'S ISSUANCE OF CCW PERMITS.

Appellees THE CITY OF SAN FERNANDO, et al., (collectively, "San Fernando") quote the Second Amendment ("the right of the people to keep and bear arms shall not be infringed"), and assert that this language does not grant a right to individual citizens to keep and bear arms, but only applies to the right of the States to maintain a militia. The question of whether the Second Amendment is an individual right or a collective right of the States, has been much debated[1], and was discussed in a recent opinion by this Court. *Fresno Pistol & Rifle Cub, Inc. v. Van de Kamp*, 965 F.2d 723 (1992). However, the issue is entirely irrelevant to this appeal.

The question of whether an Individual right or a State right was created by the Second Amendment arises only when an individual asserts a claim that he has a right that cannot be denied by the State, i.e., an *unregulatable* right, to own ("keep") and carry ("bear") arms. That is not a contention in this appeal. This appeal assumes (without necessarily agreeing) that the Second Amendment only empowers the States (as "the people") to "keep and bear arms[2]." But the States must do so through

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[1] For a thorough historical review of this issue, *see*

[2] As a matter of exegesis, the phrase "keep and bear arms" implies that the Amendment intended an individual right, since, although States can own ("keep") arms, only individuals can actually carry ("bear") them. Notably, however, the Amendment says nothing about *using* arms, thereby leaving

individuals, and one way States do that is through the licensing of persons to carry concealed weapons.

Hickman's case exists entirely within the context of the California law regarding issuance of CCW permits. It does not call into question the constitutionality of that law, nor does his Complaint assert a Second Amendment right to carry a concealed weapon without being licensed to do so by the State of California. Therefore it does not raise the issue of Individual rights over States rights.

It does, however, raise the issue of *how* the States are administering their collective right to regulate the bearing of arms. The issue is whether the *States* may be regulated *by the Second Amendment* in their exercise of the collective right supposedly granted to them thereunder. May a State, without restrictions upon the discretion of its officials, forbid all or certain classes of individuals from licensed possession of concealed firearms, or create a selected elite who are the only ones permitted to carry concealed firearms, or otherwise discriminate against citizens of good moral character in issuing CCW permits? These questions arise from this appeal.

That States, if they are the sole recipients of the right to keep and bear arms under the Second Amendment, *must* license individuals to carry weapons in some reasonable manner appears to have been decided in the historic case of *Presser v. Illinois*, 116 U.S. 252, 265, (1886). The U.S. Supreme Court there stated:

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regulation of that all-important facet of gun ownership to the States, through the Tenth Amendment.

> "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government."

The pronouncement states concerns similar to those expressed in the Second Appellate District of the California Court of Appeal in *Salute v. Pitchess, supra,* 61 Cal.App.3d at 560: "[t]o determine in advance, as a uniform rule, that only selected public officials can show good cause is to refuse to consider the existence of good cause on the part of citizens generally, and is an abuse of, and not an exercise of, discretion."

That concealed weapons may be effectively used "for maintaining the public security," and in "performing [the citizens'] duty to the general government," is indisputable. Hence, the holding of the U.S. Supreme Court in *Presser* requires that clear and appropriate restrictions be placed on the power of a State to issue, or refuse to issue, CCW Permits to citizens of good moral character. What those restrictions should be, and whether the Appellees' policy and practice violates those restrictions, are issues in this appeal.

Regarding appropriate restrictions, Hickman notes that concealed weapons to do not tend to inflame fear or

provoke tempers the way firearms do when they are carried openly. Also, if a weapon cannot be seen, it does not become an incentive to macho contests of speed and dexterity. Of course, carrying a concealed weapon involves a potential danger – the fact that its presence in a particular situation remains unperceived until it is brandished. Therefore, because of legitimate concerns for public safety, the question of whether a weapon can be carried openly or may be carried concealed has become the subject of differing regulations by the States. *See* e.g., *California Penal Code* §§ 12025 and 12031.

These regulations, and their application by officials of the State, should be subject to reasonable review under the Second Amendment, as indicated in the *Presser* decision, and it is just such a review, and nothing more, that Hickman requests of this Court, whether through the Fourteenth Amendment, or by "laying the constitutional provision in question out of view," 116 U.S. at 265, that is, on some other legal basis rooted in the power of the United States to ensure that its reserve militia is not impaired.

In such a review, the "good cause" requirement of *California Penal Code* § 12050 becomes a restriction which, if it is to survive at all, must be exercised so as not to "deprive the United States of their rightful resource." 116 U.S. at 265. It is also a restriction which should be examined in light of the stated purpose of the Second Amendment – "A well regulated Militia, being necessary to the security of a free State."

Appropriate restrictions on the right of a citizen to carry a concealed weapon, if her or she is of good moral

character[3], should reasonably include such factors as the degree of training in proper use of the weapon to be carried, and the likelihood that the citizen, or the citizen's family, might be exposed to breaches of "public security" (e.g., have they been threatened with criminal acts? or are they living, working or traveling in an area, or engaging in an occupation, that involves increased exposure to crime?).

Appropriate restrictions should *not* include any discriminatory preference for particular individuals or groups, and certainly there should be no preference for persons closely associated with the government that issues the licenses. The latter restriction works directly against one of the purposes of the reserve Militia, namely to allow free citizens to protect themselves from abuses by the State itself, or to protect the United States from such abuses. *See United States v. Miller,* 307 U.S 174, 182 fn. 3 (1939), citing 1 Cooley, Const. Lim. p. 729, and 2 Story, Const. 5th ed. p. 6465.

Governments have traditionally been fearful to give up this kind of power to the citizenry, and that reluctance is patent in the Appellees' restricted issuance of CCW Permits. But it is just such power that the Second Amendment requires them to disgorge. The restrictions that are appropriate to impose on the licensing activity of a State under the Second Amendment require that the Appellees

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[3] Only persons of good moral character would make appropriate members of a reserve Militia. Hence, that requirement of California law appears, on its face, to be a reasonable restriction.

in this case issue CCW Permits to persons with Hickman's qualifications. Not to do so deprives the United States of a rightful resource for maintaining the public security, and therefore violates the Second Amendment irrespective of the issue of Individual verses States rights.

III. APPLICATION OF THE SECOND AMENDMENT THROUGH THE FOURTEENTH AMENDMENT IS APPROPRIATE UNDER *DE JONGE*.

Can this Court apply the Second Amendment to a review of the Appellees' administration of a California statute? Hickman contends, as suggested in *Presser*, this question may be answered in the affirmative on grounds other than the Fourteenth Amendment. But with respect to the issue of incorporation, it is true that the Fourteenth Amendment has not yet been used by the U.S. Supreme Court specifically to apply the Second Amendment to the States. That fact was pointed out by this Court in *Fresno Pistol & Rifle Club, Inc., supra*, 965 F.2d at 729, *et seq.* However, Hickman contends incorporation has been implied by a specific decision of the Supreme Court, and that argument was not addressed by this Court in the foregoing opinion.

In *United States v. Cruikshank*, 92 U.S. 542 (1876), *both* the First Amendment right to peaceable assembly and the Second Amendment right to keep and bear arms were found to be inapplicable to the States through the Fourteenth Amendment. The reasoning of the Court in support of that decision was identical as to *both* of those rights. Subsequently, the test for applying portions of the Bill of Rights to the States was reversed by the Supreme Court so that the very reasoning used by the *Cruikshank* court in 1876 to exclude the peaceable assembly clause of

the First Amendment (and the Second Amendment!) from application to the States became the *basis* in 1937 for incorporation of that clause in the Fourteenth Amendment. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

The issue of whether *Cruikshank's* holding in regard to the Second Amendment should also be overturned was not before the *De Jonge* court at that time, but if it had been, the result would necessarily have been the same. *De Jonge* effectively overrules *Cruikshank* on *both* the First Amendment right of peaceable assembly *and* the Second Amendment. Hence, this Court should follow *De Jonge* and find that the Second Amendment *is* applicable to the States through the Fourteenth Amendment.

The fact that *Presser v. Illinois, supra,* was cited in a footnote to *Malloy v. Hogan*, 378 U.S. 1, 4, fn.2 (1964), as noted by San Fernando, does not mean it is still good law on the issue of incorporation under the Fourteenth Amendment.[4] It was not cited for that point in the footnote. In fact, *Cruikshank* was mentioned in that footnote as an example of the Supreme Court's rulings on the First Amendment's applicability to the States, despite the fact that it was overruled by *De Jonge*.[5]

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[4] *United States v. Miller*, 307 U.S. 174, 178, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) involved a *federal* statute (the National Firearms Act), and hence did not address the issue of whether the Second Amendment is applicable to the States through the Fourteenth Amendment.

[5] As noted in Appellant's opening brief, *Cruikshank* applied at least one portion of the First Amendment (the right to petition the government for redress of grievances) to the States. It is most often cited for that holding.